



# Generally Speaking

## Comings and Goings

The Fairbanks DAO saw many changes this month: **ADA Jason Weiner** resigned to pursue opportunities in private practice; **Amanda Norris** came aboard as the new CRIMES operator; **ADA Bill Murphree** returned to the office after retiring in 1997; he previously spent 26 years with the office and brings a wealth of experience. **ADA Sara Simpson** joined the office after a two-year stint with the Barrow DAO.

Welcome to **AAG Robert “Bob” Stoller**, the new RCA attorney for the Commercial and Fair Business Section; **ADA Robin Koutchak** who replaced **ADA Simpson** in the Barrow office; and LOA I **Nik Church**, who joined

the Juneau Labor and State Affairs Section. **Nik** previously worked in the Juneau Court Clerk’s office.

Farewell and good luck to LOA I **Tim Nault**, Juneau Labor and State Affairs Section, who is leaving to attend law school at Gonzaga University.

Belated welcome to **Linda Miller**, Legal Text Editor in the Legislation and Regulations Section; LOA I **Jean Erickson**, Commercial and Fair Business Section; and **Aurora Lehr**, summer intern for the Juneau Torts and Workers’ Compensation Section.

Overdue congratulations to **Rick Willard** on his promotion to Administrative Clerk II, Juneau Civil Division; and **Patti Yeaple’s** promotion to an LOA II in the Juneau Human Services Section.

Farewell to **AAG Angie Richards** who has left the Collections and Support Section to pursue a career in the private sector.

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## CIVIL DIVISION

### Child Protection

**New CINA cases** based upon allegations in OCS petitions:

In Juneau, two children were removed from the care of their grandparents when it became clear the caregivers could not provide for the children’s mental health needs. The children were suicidal and engaging in self-mutilation. The parents are unable to take care of them due to their own substance abuse and mental illness issues.

OCS filed a petition in court asking the judge to remove an infant from the care of her mother. The mother had had a child removed from her care previously, due to allegations that the child was sexually abused. The mother failed to follow

the recommendations of OCS and obtain sex abuse offender treatment.

A mentally ill mother requested assistance from OCS. OCS provided family stabilization services but the services were unsuccessful. The mother asked OCS to assume custody of her children; the father's whereabouts are unknown.

OCS received a report that three children were being left in the care of adults who had histories of substance abuse and perpetrating sexual abuse. A petition to terminate the parental rights of the adults is pending. The parents of the children were aware of the caregivers' histories and chose to leave the children anyway. The children had been in OCS custody previously.

OCS assumed emergency custody for the following children:

A 1-year-old whose mother was arrested for prostitution and no appropriate caregiver could be found. The mother has long standing substance abuse issues.

An 11-year-old boy after his infant sibling died in the home. The cause of the death is still under investigation.

Three children after they alleged their mother physically abused them and was frequently intoxicated. The social worker found scratch marks, bruises and cigarette burn scars on the children.

An infant when he was found to be in the company of his father. The father is awaiting trial on murder charges for the shaking death of a sibling. The mother had been instructed not to allow the child to be in the presence of his father without an unrelated third party being present.

A child at the father's request; the mother was mentally ill and violent. Even with assistance from OCS, the father felt he was unable to protect the child from the mother.

A child when the father was arrested by APD for selling cocaine and no appropriate caregivers were available at the time. The mother resides out of state and OCS is investigating to see if the mother can care for the child.

Three children after the parents refused to participate in services aimed at preventing the children's removal. The parents have a history of drug abuse, domestic violence, and being unable to meet the basic needs of the children. The family has a history with OCS dating back three years.

Numerous children were taken into custody as a result of serious risk of harm as a result of their parents' substance abuse and domestic violence.

### Collections and Support

The fiscal-year-end collections have been compiled and collections totaled \$5.8 million. The FY2007 breakdown is as follows:

Cost of Appointed Counsel:	\$ 766,254.73
Cost of Incarceration:	\$ 906,679.55
Court Fines:	\$1,213,817.45
Traffic & Minor Offense Fines & Bonds	\$ 482,142.96
Court & Collection Costs:	\$ 196,275.94
Criminal Restitution:	\$1,414,228.14
Juvenile Restitution:	\$ 836,979.50
TOTAL:	\$5,816,378.27

### Commercial and Fair Business

#### **AOL Settlement**

The state entered into a multi-state settlement with AOL, one of the nation's largest Internet service providers. The settlement resolves complaints in which consumers alleged difficulty and confusion in attempting to cancel their AOL paid services. The settlement requires the company to make significant changes in honoring consumer cancellation requests, addresses a

number of billing practices that created the consumer confusion, requires the payment of refunds to consumers who filed complaints, and a payment to the states in the amount of \$3,000,000.

### **Consumer Protection Outreach**

The Consumer Protection Unit and Alaska Legal Services Corporation teamed up to present a pro bono clinic for Mat-Su residents on July 11. The clinic, "Consumer Protection Fundamentals", covered common scams, identity theft, and motor vehicle issues. AAG Cindy Drinkwater and summer intern Sarah Melton represented the Consumer Protection Unit.

### **Real Estate Commission Adopts Settlement Agreement**

On July 12, the Real Estate Commission ("Commission") adopted a memorandum of agreement ("MOA") negotiated between the Division of Corporations, Business and Professional Licensing ("Division") and an Anchor Point real estate licensee, which settled a disciplinary action filed by the division. The licensee represented the sellers of a 30 acre tract of land in Chickaloon whose only road access to their cabin was a driveway that required an easement because it ran partly through the adjoining property.

The buyers discovered after the sale the driveway was not on the easement and they were thereafter required to relocate the driveway to conform to the easement. The division alleged in an accusation that the licensee misrepresented the property by failing to disclose to the buyers and their agent that they were not getting the access they bargained for. The licensee denied he knew, prior to closing, that the driveway was not on the easement. The matter was referred to the Office of Administrative Hearings and a hearing commenced on June 20, 2007 in Anchorage.

During an extended break in the hearing caused by a power outage, the parties negotiated and executed the MOA. Under the terms of the MOA, the licensee is on probation for one year, fined \$5000 (with \$2500 suspended), required to attend and satisfactorily complete six credit hours of education dealing with ethical decision making and disclosure issues, and formally reprimanded for failing to disclose pertinent information in a real estate transaction and for making misrepresentations regarding a legal defect in the subject property. AAG Robert Auth represented the Division in this proceeding.

### **Three Cases Resolved By Board Of Marine Pilots**

At a meeting on July 12 the Board of Marine Pilots voted to adopt a memorandum of agreement that authorized the renewal of a marine pilot's state license. The board had refused to renew the license for the 2007-2008 biennial license period unless the licensee had completed some additional training on a vessel bridge simulator intended to improve ship handling skills.

The licensee disputed the board's authority to require this training as a prerequisite for the renewal of his license, and asked for an administrative hearing on the denial. He also filed an action in superior court, and moved for an injunction ordering the board to renew his license. After Superior Court Judge Michael Spaan denied the motion for a preliminary injunction, the licensee filed a petition for review with the Alaska Supreme Court, but he also decided to complete the training required by the board. Once proof of successful completion of the training was received, a renewed license was issued to licensee. This will resolve the pending actions in: 1) the Office of Administrative Hearings, 2) the superior court, and 3) the supreme court. Former AAG David Brower and current AAG Gayle Horetski represented the board and staff in these various proceedings. AAG Horetski also negotiated the settlement that brought these matters to closure.

## **Bankruptcy Court Grants Summary Judgment To Alaska Commission On Post Secondary Education (ACPE)**

As reported last month, AAG Mary Ellen Beardsley, on behalf of ACPE, opposed efforts to open a 20-year-old Chapter 7 proceeding for the purpose of determining if a debtor's student loan debt was discharged in 1987. AAG Beardsley filed a motion for summary judgment on behalf of ACPE arguing that the case should be closed because (1) the debtor's loans were not discharged in 1987 or in 2004, (2) too much time has elapsed (20 years) since the debtor's 1987 bankruptcy to allow her to reopen the case to file an adversary proceeding, and (3) laches precludes the debtor from being able to reopen the case. Bankruptcy Judge Ross recently granted ACPE's motion and determined the debtor's loans were not discharged under the laws as they existed in 1987 and in 2007. He elected not to address the other two grounds. He further advised ACPE that it could file a motion for fees and costs along with a proposed judgment regarding the non-discharge ability of her student loans.

## **Environmental**

***State v. Gary and Judith Hinkle.*** The superior court denied the Hinkles' motion to vacate consent decree and strict liability orders. The decision upholds a settlement reached in 2000 under which the Hinkles' agreed to pay \$1.6 million to the state to resolve their liability for costs incurred by the state to respond to dry cleaning solvent contamination on the Hinkles' River Terrace property on the Kenai River and for treatment of contaminated ground water. The Hinkles' final payment to the state in the amount of \$1,300,000, plus interest, is due in 2010.

***DEC v. Michael Bateman.*** State Farm agreed to pay the state \$200,000 to reimburse part of DEC's cleanup costs at the Wyoming Drive site in Spenard. The superior court later denied the remaining insurers' motion to dismiss DEC's direct

action against them based on an assignment of insurance rights by Michael Bateman and the McGalliard Estate. The superior court also denied the insurers' motion for summary judgment that DEC's cost recovery claims were barred by the business exclusion in the McGalliards' homeowner's policies. The superior court found that there were disputed issues of facts concerning whether the contamination at the site was the result of a business and whether the past scrap metal operations of Mildred McGalliard's deceased husband constituted a business under the policies. AAG Breck Tostevin represented DEC in the case.

## **Human Services**

### **Litigation Update**

The section was served with a new lawsuit filed by Alaska Legal Services. The focus of the complaint is how eligibility is assessed for the Personal Care Attendant program. The complaint alleges that the eligibility determination for certain individuals who only need limited assistance with one activity of daily living is arbitrary and capricious. AAGs Nevhiz Calik and Robin Fowler will handle this case.

The section lost two superior court appeals on the Medicaid Waiver program. The first one revolved around the court's determination that respite services could not be denied to a family member who is the primary paid caregiver. The section believes this is in direct violation of state and federal law. A motion for reconsideration was filed.

The second superior court decision involved the process in determining level of care for the Older Alaskan and Adults with Physical Disabilities Waiver. The regulation requires consideration of an assessment tool as well as the Manual for Long-Term Care Authorization. The section argued the assessment incorporated the manual in its scoring, but the judge disagreed. AAG Calik

and Section Chief Stacy Kraly are working with the division in response to this and another decision on similar issues.

### **Medicaid**

### **Audits**

AAG Rebecca Polizzotto, with assistance from AAG Libby Bakalar, continues to work through cycle two audits. They worked on two briefs this past month that will assist in better clarifying the legal framework in which these audits operate.

### **Subrogation/Liens**

During the month of July, the Medicaid third-party recovery "team" collected a total of \$32,693.94 as a result of 10 case resolutions. At the present time, there is an inventory of 708 open matters involving subrogation/liens and 838 matters have been resolved with the AG's involvement since January of 2005. In addition to the ongoing Medicaid third-party recovery efforts, additional work is now being performed in connection with recovery from Medicaid beneficiaries' estates. As of July, the AG's office has transitioned into performing this work in lieu of an outside contractor. There are 24 open estate recovery matters at the present time.

### **Other**

### **Senior Care**

Final regulations for the Department of Health and Social Services related to the new Senior Care program were filed with the Lt. Governor's office so that the program can be implemented on August 1, 2007. AAG Kelly Henriksen worked on these regulations.

### **Mediation Training**

AAG Beth Russo participated in a five-day mediation training in Anchorage for probate court.

## **Labor and State Affairs**

### **Elections**

**Nick v. Parnell.** In this case, plaintiffs claim the Voting Rights Act requires the state to make printed election ballots available in Yup'ik. At a July 24 argument before Judge Burgess, AAG Sarah Felix opposed plaintiffs' claim that the Voting Rights Act entitled them to a hearing before a three judge panel, rather than before a single federal district court judge.

### **Employment**

**Billingham v. State.** Judge Volland ordered the division to produce, in un-redacted form, confidential personnel records (AS 39.25.080) to the Alaska State Commission for Human Rights. However, the court imposed conditions that protected the confidentiality of the records: he restricted access to the records and required the records be placed in a sealed envelope marked "confidential material." AAG Jan DeYoung represented the division in the subpoena dispute.

### **Workers' Compensation**

On July 6 the Alaska Supreme Court issued the decision in **AT & T Alascom v. Orchitt**, affirming the superior court's determination that the Alaska Workers' Compensation Board and Chair had not violated the employer's rights to due process or under the Workers' Compensation Act or regulations. The employer had argued that, by denying its requests for a continuance and to require the employee to undergo an additional medical examination by the employer's experts, the board, and specifically Chair Wielechowski, violated due process and the act. A specific objection was that the chair's appointment to the panel of a department hearing officer, who held a position as an officer of the AFL-CIO, resulted in a panel of board members that was unbalanced and in violation of AS 23.30.005. That law requires a panel of the board to be comprised of three members—representatives of industry, of

labor, and of the Commissioner of Labor and Workforce Development.

The commissioner's representative is a department employee who serves as the chair. The Court rejected the challenge to the representative, stating that holding a union position was insufficient to establish actual or probable bias and, further, the law did not restrict whom the commissioner could appoint as his representative. The Court also concluded holding the position of union officer did not violate the Code of Judicial Conduct (which prohibits judges from serving as officers of organizations likely to come before them) even if the code were to apply to workers' compensation hearing officers, but it declined to decide whether the code did apply. AAG Larry McKinstry handled this matter for the board.

### Legislation and Regulations

During July, the Legislation and Regulations Section spent an active month editing several bill reviews for legal issues on bills pending before the governor for action. Regulations projects reviewed in the section during July 2007 include: Department of Health and Social Services (reimbursement for services of licensed free-standing birth centers); State Board of Education and Early Development (phase I regulations for children with disabilities); Alaska Police Standards Council (minimum standards and reporting of personnel actions for officers); Board of Fisheries (statewide finfish regulations et al.); Board of Game (Tier II subsistence hunting permit point system); Department of Fish and Game (commercial fishery reporting requirements; sport fishing services and guide report requirements); Board of Registration for Architects, Engineers, and Land Surveyors (practices of land surveyors); Board of Pharmacy (examinations, temporary licenses, prescribing drug orders transmitted by electronic means); Board of Nursing (administration of non-herbal nutritional supplements); State Medical Board (examinations, licensure of physician assistants, and collaborative

practice); Department of Natural Resources (prohibited and restricted noxious weeds).

The section finalized the 2007 edition of the Drafting Manual for Administrative Regulations. Also, the section completed plans for the department's annual regulations classes being held at the end of August 2007.

### Natural Resources

***U.S. v. Harlan Mahle.*** On July 5 the section received a favorable decision from the Interior Board of Land Appeals in *U.S. v. Harlan Mahle*, 171 IBLA 330 (June 30, 2007), an appeal from a government contest hearing for a Native allotment claim near Skagway. In a 66-page decision the IBLA affirmed the Administrative Law Judge below in all respects.

Specifically, the board found that (1) the allotment applicant had not demonstrated qualifying use and occupancy of the claim; (2) the state's selection of a portion of the claim (later conveyed to the City of Skagway) pre-dated filing of the allotment application, thus that portion was not excluded from the state's Tentative Approval by the allotment serial number and could not be legislatively approved under Sec. 905 of ANILCA; (3) the allotment heirs' attempt to reconfigure a portion of the allotment claim constituted an untimely amendment to the allotment land description under Sec. 905 of ANILCA; and (4) it was proper to employ a government contest hearing notwithstanding that the allotment claim in part described lands conveyed out of U.S. ownership (to the state), a fact that otherwise would require adjudication through the Stipulated Procedures under *Aguilar v. United States*, 474 F. Supp. 840 (D. Alaska 1979). AAG John Baker represented the state in this matter.

***Sherman C. "Red" Smith v. State.*** Senior AAG Lance Nelson received a final judgment of dismissal from the Kenai Superior Court in this

case. The plaintiff sued two former governors, a former AG, a former commissioner, and an AAG, as well as several state offices and the judicial branch, over issues arising out of his failure to receive title to a couple of parcels of land from the federal and state governments in the 1980's. He also claimed that state officials had failed to apply and enforce section 16 of article VIII of the Alaska Constitution (no involuntary divestment of right to use waters, interests in land, except for public use with compensation), especially against the federal government. The court found the complaint failed to state a claim against the particular individual defendants and that claims against the state agencies either failed to state a claim or were time-barred by the applicable statutes of limitations.

***Lynn Canal Conservation v. DNR.*** On July 3, Judge Collins issued a decision in favor of the Department of Natural Resources, affirming the agency's decision regarding the operation of commercial jet boat tours in the Chilkat Bald Eagle Preserve near Haines. Appellants Lynn Canal Conservation, Southeast Alaska Conservation Council, Juneau Audubon Society and Joe Hotch argued that DNR had failed in its statutory duty to protect the preserve in perpetuity when it issued a permit for jet boat operations. Appellants claimed jet boats could damage sensitive salmon habitat in the Chilkat River. However, Judge Collins ruled DNR relied upon substantial evidence in reaching its decision that jet boat tours under the conditions of the permit will not result in long-term negative impacts on salmon spawning or other protected goals for the preserve.

Prior to receiving a decision in this case, appellants, represented by Earthjustice, requested and obtained a stay of decision. The stay was requested until the Alaska Supreme Court ruled upon whether its decision in *State of Alaska v. Native Village of Nunapitchuk* was to be applied prospectively only. As a result of the decision in *Nunapitchuk*, public litigants may be subject to attorneys' fees in cases where the state prevails. The state has requested fees in this case and

has agreed to an extension of time for Lynn Canal Conservation to file its opposition. The state is represented by AAGs Tom Lenhart and John Baker in this matter.

***State v. Manning.*** On July 6 the Alaska Supreme Court issued its long-awaited opinion in *this case*, a case in which several of the Board of Game's criteria for scoring Tier II hunting permit applications were alleged to be unconstitutional and in which the parties had put the ongoing validity of the *McDowell* case at issue. The decision addressed none of the larger issues, and the Court simply affirmed the trial court. Thus, the Court found that two of the board's criteria, cost of food and cost of gasoline, were constitutional and one, availability of alternate sources of game, was not. Senior AAG Kevin Saxby represented the state in this lengthy series of cases.

## **Tier II**

On July 20 Judge Jack Smith issued an injunction in a case brought by the Ahtna Tene Nene' Subsistence Committee and others invalidating all current permits for Nelchina caribou and Unit 13 moose Tier II hunts, mandating that existing applications be rescored, and prohibiting implementation of parts of two new regulations the Board of Game had recently adopted when that rescoring is done. He ordered that, while the board may use income as a criterion to measure the availability of food, it may not allow income to drive an applicant's entire score to zero, despite the board's conclusion income is the most important measure of one's ability to obtain food. The judge also ordered that the board may not prohibit Tier II permittees from hunting the subject species in other areas of the state, despite the statutory requirement that Tier II permits go only to those who are dependent on the population in question as a mainstay of their livelihood. AAG Kevin Saxby represented the board.

## Predator Control Lawsuits

In the consolidated challenges to the state's predator control programs, initiated by Defenders of Wildlife and Friends of Animals, the parties have been busily engaged in briefing motions and cross-motions for summary judgment. AAG Kevin Saxby also represents the state in these cases.

***Eastwood v. State, CFEC.*** On June 27, 2007, AAG Vanessa Lamantia filed the state's brief in the Juneau Superior Court in this appeal of a CFEC decision denying the appellant's claim for skipper participation points for 1982 for the Northern Southeast Inside sablefish fishery. The state argued Eastwood failed to meet the harvest threshold to be awarded points for that season, failed to prove his circumstances qualified as "extraordinary circumstances," and failed to prove he could reasonably have claimed the points but for his extraordinary circumstances under CFEC regulations. The state also argued Eastwood's request to remand the case to allow for the introduction of additional evidence is not warranted because he had ample opportunity to supplement the record but simply failed to prove his claim.

## Federal Subsistence

The end of June through July was another busy month for federal subsistence issues. AAGs Mike Sewright and Steven Daugherty assisted the Alaska Department of Fish & Game with numerous issues including responses to federal data requests, filing of new requests for reconsideration with the Federal Subsistence Board (FSB), and continuing litigation involving federal claims to reserved water rights for federal subsistence jurisdiction purposes and FSB customary and traditional use (C&T) determinations.

Perhaps of most immediate consequence, the section assisted the Alaska Department of Fish & Game (ADF&G) with a June 29 request for reconsideration (RFR) of the FSB's failure in May to reach the merits of its prior C&T determination for Ninilchik (including Happy

Valley) to Kenai River fish after the board had already voted to reconsider that determination. In that same RFR, the FSB was requested to reconsider its denial in May of a related proposal to repeal all of its recent C&T determinations to fish for Kenai Peninsula road system communities including Ninilchik, Hope, and Cooper Landing.

On July 13, the FSB accepted the first part of that RFR. The board agreed that, having previously accepted reconsideration, it should have re-voted on the underlying C&T determination. The FSB will re-vote on this issue at its next public meeting in September. Board action on the remainder of this RFR is still awaiting federal staff analysis, as is a June 28 RFR involving sales of bear parts.

The section also assisted ADF&G with development of a July 6 request for reconsideration of the FSB's May 7, 2007, rural/non-rural determinations qualifying "rural" communities for federal subsistence. As part of this request, which is also awaiting federal staff analysis, the state requested a more complete review and consistent application of regulatory standards for aggregating communities, including Kenai Peninsula highway system communities.

On June 27 the section received an adverse decision in a federal court case challenging a C&T determination for Chistochina for moose in all of Game Management Unit 12. The FSB had provided a C&T determination for all 10,000 square miles of Unit 12 when the most liberal reading of the evidence would only support a determination for 2,500 sq. miles. The case was decided on summary judgment, with the U.S. arguing that despite its regulations requiring identification of "the specific community or area's use of specific fish stocks and wildlife populations," historical taking of moose in an area is not required to support a positive C&T determination. The court rejected the state's argument that the "take" must be "customary and traditional" to be "subsistence use". The court indicated that it was not prepared to agree that there are no geographical limits to a C&T



determination, but provided no guidance as to what those limits might be or what the source of such limits might be. The court accepted the federal argument that section 815 of ANILCA, which prohibits unnecessary restrictions of non-subsistence uses, is not implicated by C&T determinations because the determination itself “does not *per se* limit non-subsistence hunting” on the public lands, despite the fact that in this case the C&T determination had the immediate effect of granting additional hunting privileges to Chistochina residents through harvest regulations already in place.

### Opinions, Appeals and Ethics

The section’s principal activities for the month have addressed the new ethics legislation, which Governor Palin signed into law effective July 10. The section updated designated ethics supervisors about the changes and have been responding to numerous inquiries regarding the changes. With the exception of the ethics video, all of the guidance and forms on the Department of Law ethics web page have been updated to incorporate the amendments as well as the changes required by the transfer of ethics functions from the assigned legal assistant in Juneau to Kamie Willis in Anchorage.

AAGs Dave Jones and Judy Bockmon met with Department of Administration training staff to coordinate development of a new ethics component to the supervisor training class and a new online presentation for all employees. They will assist in developing a training presentation for designated ethics supervisors.

AAG Judy Bockmon gave an ethics presentation to the staff of the Alaska Oil and Gas Conservation Commission on July 12. She also gave an Ethics Act presentation to UAA graduate students in their “Public Accountability, Ethics and Law” class on July 23.

The Department of Law has been asked to provide ethics training for the upper level personnel of all Executive Branch agencies. This month’s training sessions include the Department of Natural Resources (July 18), Department of Administration (July 25) and Department of Health and Social Services (July 30).

### **Appeals/Litigation**

***Wetherhorn v. A.P.I.*** After considering supplemental briefing addressing the effect of its recent decision in *State v. Native Village of Nunapitchuk*, the Alaska Supreme Court rejected Ms. Wetherhorn’s request for full attorney’s fees and awarded fees only for work devoted to the constitutional issue upon which she was deemed to prevail. This amounts to only about one-eighth of the full fees sought.

In *Nunapitchuk*, the Court upheld the amended public interest litigant statute (HB 145) against a constitutional challenge. The Court found the exception was a court-made doctrine of substantive law that the legislature could modify as a matter of public policy, without adhering to the super-majority required for changes to court rules. *Nunapitchuk* itself was decided in the context of an award of fees by the trial court under Civil Rule 82.

In Ms. Wetherhorn’s supplemental briefing, she suggested that the public interest litigant exception as it pertains to fee awards on appeal might be textually based in Appellate Rule 508, in which case HB 145 would not be constitutional for failure to pass by a supermajority of votes. She also argued, for the first time, that she is entitled to an award of full reasonable fees under Rule 508 apart from the public interest litigant exception or any status as a prevailing party. She asserted that her claim to full fees is constitutionally based in the right to counsel, the Court’s interest in administration and justice, and the right of access to the courts. The Court was not persuaded by any of these arguments and ordered an award of fees consistent with the amended public interest litigant statute.

**Burke P. v. SOA, OCS.** The Alaska Supreme Court issued a decision in this termination of parental rights case. The Court, in a 3-2 decision, affirmed the termination of a father's parental rights and the denial of his demand for post-termination visitation.

The Court upheld the trial court's termination of the father's rights to all his children, even though the youngest had never suffered substantial harm at the parents' hands. The Court found that the mother's history of physically abusing the older children and the father's history of not interceding to protect them would substantially endanger the child if he were returned to the family home.

Also, in what the majority called "an extremely close case," the Court held that the state Office of Children's Services' efforts to reunite the family were reasonable as to the father.

The father's only shortcomings were that he was not very involved with his family and did not intercede appropriately to protect the children from their mother. OCS provided a phenomenal level of services over several years to address the mother's issues, while providing only a few referrals for the father and offering him feedback in interacting properly with his family. The dissent felt that because the father had "no obvious problems that make him an unfit parent," in order for OCS's efforts toward the father to have been deemed reasonable, the agency should at least have advised him that he would need to leave the mother in order to have a chance to be reunited with the children.

Finally, the Court affirmed the trial court's denial of the father's demand for post-termination visits with the children. The Court did not hold that trial courts are without authority to order such visitation, but intimated that any such authority is limited to cases having "extraordinary circumstances." AAG Mike Hotchkin handled the appeal.

**A.N. v. State.** AAG Mike Hotchkin drafted a response to a petition for review filed by a Bethel

Alaska Legal Services attorney. The case involves five Alaska Native children in state custody. The Office of Children's Services placed the children with their maternal grandparents, and all parties agreed that a cultural adoption by the grandparents would follow. Before the adoption was finalized, however, circumstances caused OCS to remove the children from the grandparents. The mother and the grandparents argued in superior court that the mother's agreement with OCS's placement decision and the parties' expectation that the placement would be finalized as a cultural adoption resulted in the grandparents becoming the children's Indian custodians under the Indian Child Welfare Act. They argue that (1) the mother transferred temporary physical custody of the children to her parents, and (2) under tribal custom, the grandparents have "legal custody" of the children.

OCS argued that under the superior court order granting it legal custody of the children, it, not the grandparents, remains the children's "legal custodian," and that it was OCS, not the mother that transferred temporary physical custody of the children to the grandparents.

The superior court declared the grandparents to not be Indian custodians, and the grandparents petitioned the Alaska Supreme Court to review that determination. The grandparents' status is relevant because under ICWA, before the superior court may authorize OCS's removal of children from their Indian custodian, it must make specific findings that it need not make when approving OCS's transfer of placement from one foster parent to another.

In the same case, the Native Village of Kwethluk lodged a petition with the Supreme Court seeking review of the superior court's decision not to transfer jurisdiction over the case to the tribal court. The supreme court has yet to accept that petition for filing due to deficiencies in the manner in which it was filed.

***American Dental Society, Alaska Dental Society et. al. v. Alaska Native Tribal Health Consortium and State of Alaska.*** Judge Rindner granted the state and Alaska Native Tribal Health Consortium's (ANTHC) motions for summary judgment in late June. The court ruled that the federal Community Health Aide Program enacted in 25 U.S.C. § 1616/ preempts enforcement of state dental licensing laws as applied to dental health aide therapists licensed by and working in the Community Health Aide Program in Alaska. The decision effectively affirms a September 2005 informal attorney general opinion which reached the same conclusion.

Shortly after the court rendered its decision, the State of Alaska, the American Dental Association (ADA), an individual dentist-plaintiff from another state and ANTHC entered into a settlement agreement. Under the terms of the settlement, the plaintiffs dismissed all claims against the state and ANTHC and the parties agreed to mutual covenants not to sue or to assist others in filing suits concerning the activities or licensure of dental health aides. The state received \$75,000 from the ADA. The ADA contributed \$537,500 to ANTHC's foundation to support preventative oral health in Alaska.

Other significant aspects of the settlement include the ADA's commitment to promote additional residencies and rotating internships for Alaska dental students and to use its best efforts to develop a "pipeline program" with dental schools to encourage dental school graduates to work for at least two years for the Public Health Service or tribal health organizations in Alaska communities located off the road system. ANTHC agreed to ask the Indian Health Service to add a second seat to the Community Health Aide Program Certification Board and to the board's Dental Academic Review Committee for a licensed dentist nominated by the ADA. The ADA and ANTHC agreed to support pending amendments to the Indian Health Care Improvement Act that support the work of dental health aides in Alaska. The ADA and ANTHC will also cooperate on

studies of oral health care delivery in remote areas of Alaska.

The Alaska Dental Society and individual Alaska dentist-plaintiffs joined in the dismissal of all claims, the mutual covenant not to sue and support for amendments to the IHCA, thus ending the litigation. AAGs Mike Hotchkin and Paul Lyle handled the litigation for the state.

## [Regulatory Affairs and Public Advocacy](#)

### **Appellate Decision**

#### **3AN-05-11721CI (RCA, U-04-22/23), AWWU.**

On June 25 the Anchorage Superior Court upheld a Regulatory Commission of Alaska (RCA) decision that Anchorage Water and Wastewater Utility (AWWU) cannot increase its rates to offset payments in lieu of property taxes on contributed utility property that the utility is required to pay the Municipality of Anchorage. The AG/public advocate successfully argued before the RCA and the court on appeal that the municipal assessment (also known as Municipal Utilities Service Assessment or MUSA) cannot be included in consumer rates. As a result, AWWU remains subject to an estimated \$17 million refund obligation of already-implemented rate increases, unless it successfully appeals to the Alaska Supreme Court.

On July 10 the attorney general issued a *Public Advocate Advisory* ("Court Upholds RCA Decision Requiring Substantial Refunds for AWWU Customers") explaining the history of the case and the ratepayer impact of the appellate decision. The increased water and sewer rates have been in effect on an interim but refundable basis since 2004 while the case was litigated before the RCA and during the utility's appeal to the superior court.

## Recent Filings

### U-05-103, AWWU – Pre-filed Reply testimony.

On June 29, 2007, RAPA pre-filed the direct testimony of its staff expert, Janet Fairchild, regarding the cost of service and rate design for AWWU wastewater division. That testimony recommends to the commission that the utility should rerun its cost of service study to: correct its calculation of trailer court customer volumes, establish individual equivalency factors for each commercial customer group, and remove septic haulers from I & I allocation. Further, that rates resulting from related rate design modifications should be implemented on an interim refundable basis pending the ultimate outcome of the MUSA appeal. (See Appellate Decision, above)

### TA 175-14, GVEA wheeling rate – Comments.

Golden Valley Electric Association (GVEA) filed a tariff proposal with the RCA on June 7, 2007 proposing to add (rate) provisions for common transmission (“wheeling”) service and agreements for firm point-to-point service to customers on GVEA’s transmission system. On July 12, 2007, RAPA filed Comments of the Attorney General recommending that the RCA should suspend the rate filing for further investigation related to cost support, cost of service methodology, and load/reserve assumptions. RAPA also noted that the proposed tariff provisions are a matter of first impression and that the proposal may impact the interconnected rail belt energy grid.

## Torts and Workers’ Compensation

One of the oldest cases in the Juneau Torts and Workers’ Compensation Section went to trial this month, and resulted in a directed verdict for the state. Jason Miller fell on a ramp at Aurora Harbor in 2002 seriously breaking his ankle, and sued first the City and Borough of Juneau (operator and manager of the dock), then the state (as owner of the dock facilities), and finally the fishing vessel on which he was working at the time. The vessel’s insurer also sued the city and the state to get reimbursement for

payments it had made on Miller’s behalf under maritime law (maintenance and cure, unearned wages).

Before trial, the city and state settled with Miller. However, a bench trial (without jury) went forward on Miller’s Jones Act negligence action against the vessel, and the vessel insurer’s claims against the city and state. Senior Judge Donald Hopwood granted a directed verdict to the state on one legal issue, so the state is guaranteed dismissal in its favor. The judge took under advisement a second argument for directed verdict by the state, as well as the city’s motion for directed verdict and the merits of Miller’s case against the vessel. A decision is expected in the near future. The state will be filing a motion for attorney’s fees when final judgment is entered. The case was defended by Senior AAG Susan Cox.

In July, the Workers’ Compensation Appeals Commission affirmed the Workers’ Compensation Board’s denial of a claim by a former corrections officer for permanent total disability benefits. The former employee, Carl Kelley, contended he suffered from disabling post-traumatic stress disorder as a result of threats he had received from inmates. He also contended because the state had initially accepted the claim (and had indeed paid benefits for several years), the state was estopped from subsequently denying the claim. The commission agreed with the state’s arguments on all issues, and affirmed the board’s decision. The commission rejected the estoppel argument because it concluded that none of the elements of estoppel had been met. The state did not affirmatively assert a position that it would pay benefits indefinitely, and there was no evidence of detrimental reliance on the part of the claimant. This matter was defended by AAG Joe Cooper.

## Transportation

**Firestorm over trucks doused.** Four new fire trucks bound for remote Alaska village airports were shipped above deck on barges in violation

of an explicit contract provision, and arrived with detectable surface corrosion. Based on past experience, Statewide Equipment Fleet managers worried the corrosion indicated broader problems that could limit the effectiveness or shorten the lifespan of these key bulwarks of airport public safety. Eventually, the manufacturer agreed that if the state paid one third of the cost to ship the vehicles back, the manufacturer would provide new fire trucks. AAG Gary Gantz represented the state.

## CRIMINAL DIVISION

### Bethel DAO

A highlight this month was a visit on July 9-10 by Attorney General Colberg and Chief AAG Susan McLean; it was a nice visit and provided a boost for everyone.

The office continues to deal with a high load of sexual assaults and sexual abuse of minor cases, and has been in trial a lot, as well as keeping the grand jury busy. There have also been a few homicides since last month. The venue map has changed, thus increasing the size of the office's coverage.

ADAs Thomas Jamgochian and David Buettner continue to hold down the fort with DA Joanis on the serious felonies. They are also covering the misdemeanor load for the entire Yukon-Kuskokwim Delta, with the exception of bootleg and drug prosecutor ADA Barkis' drug and alcohol misdemeanors. ADA Regan Williams from the Rural Prosecution Unit came to Bethel the last week of July to help with court coverage. Four attorneys have been covering court in front of eight judges since DA Joe Slusser's departure May 31, 2007.

### Fairbanks DAO

ADAs Jason Gazewood and Corinne Vorenkamp spent the month in trial in the Marvin Wright case. Wright is accused of the September 1995 murder of Tricia Warren at a local business. Wright was indicted for the crime in 2006. The trial started with jury selection on July 2 and is expected to finish by July 31.

Through July 25, the misdemeanor unit received 72 new DUI cases. In addition to the other assorted misdemeanor cases referred, the unit has been busy with trials throughout the month. The felony unit has also been busy. The unit received 10 new referrals for felony DUI through July 25.

### Kenai DAO

There are still changes occurring within the Peninsula court system, which has resulted in fewer trials this month.

In one trial that was scheduled to take two weeks the defendant pled the morning of the trial with the jury waiting in the wings. The defendant was charged with over 100 counts involving a six-year scheme to defraud and embezzle money from her employer, a local seafood packaging firm. She pled to all the overriding charges: scheme to defraud, theft in the first degree, falsifying business records, and tampering with evidence and the underlying forgeries were the remaining counts. She has five prior convictions for forgery out of one case in which she embezzled money from her previous employer in much the same way as in this case, but she was caught much sooner the last time. Part of the agreement was that she had to remand the week she pled, which she did. She had already gotten employment with another local firm while this case was pending.

Although trials have been slow, it is summer on the Peninsula, so there are plenty of new crimes. The grand jury heard eleven felony DUIs this month. They also heard three burglary cases in

one day as well as the usual assortment of vehicle thefts, drug cases, and assaults.

In one felony domestic violence case, the defendant came to the house of his soon to be ex-wife and held a knife to her throat, leaving lacerations. He also slammed her head causing bleeding from her ear. He then committed several sexual assaults on her and took one of their children away when he left. She was unable to get him to return the child and reported it to the police. The defendant refused to return the child for almost a month and there was concern for the child's safety. Eventually the police were able to locate and arrest him and return the child to the mother unharmed. Prior to the grand jury, the defendant called the victim several times from jail telling her to "take the fifth" at grand jury or not testify. The grand jury indicted on four counts of assault in the second degree, three counts of sexual assault in the first degree, one count of assault in the third degree, and one count of interference with official proceedings.

In a case out of Seward, there was a SERT (State Emergency Response Team) callout when an individual told people that he was going to kill anyone who came near him or who drove down the road. This caused the troopers to shut down Exit Glacier Road for three hours. During the exchange with troopers, the defendant threatened to shoot any of them who came near him, and he in fact shot off several rounds during the incident. He was eventually convinced to surrender, and the standoff ended with no one being harmed. The grand jury indicted on several counts of felony assault as well as felon in possession of a firearm and coercion.

### Kotzebue/Nome DAO

Kotzebue saw a number of noteworthy developments during July.

Following two days of jury selection in his trial for sexual assault one, Ralph Hess entered a

plea to burglary one with ten years, three suspended, and ten years probation. This happened on the eve of opening statements, when new evidence made conviction beyond a reasonable doubt problematic. Hess was presumptive from a prior sexual assault against a minor two conviction.

During March 2006, Enoch Porter beat and stabbed his girlfriend, Davidann Russell, then threatened to kill her if she left him. Russell suffered 14 stab wounds and a fractured jaw from the incident. After the attack, she walked herself to the hospital. On July 5, Porter plead to assault one and received 20 years with 10 suspended and 10 years probation.

Eli Mitchell entered a plea to assault one instead of taking his chances at trial for attempted murder. Mitchell had taken an axe to his ex-wife, injuring her face and arm. A neighbor prevented further injuries. Mitchell received a sentence of 20 years with 5 suspended and will be on probation for 10 years.

Paul Burke, a retired 20-year Alaska State Trooper, has returned to Alaska to become the Nome Police Chief.

### Palmer DAO

#### **Trials**

A Palmer jury convicted Karl Girard of driving under the influence, driving while license revoked, and multiple counts of assault in the third degree. Girard caused a motor vehicle collision by suddenly pulling out in front of a mother who was driving her two children to the Butte for a mid-day hike. The airbags in the victims' Dodge Durango deployed preventing injuries more serious than the bruising they sustained. The defendant was taken to the hospital where tests revealed a blood alcohol level of .250. The two children, a 9-year-old boy and 7-year-old girl, testified at trial. Girard testified he drank a fifth of whiskey the night before and had one beer at lunch. He

claimed that, due to a bad liver, he did not realize he would still be under the influence of alcohol during the day. Trial prosecutors were ADA Jon-Marc Petersen and Melissa Wining-Howard (Palmer summer legal intern).

Christopher Woodard was convicted after a jury trial of sexually abusing his 7-year-old niece. The conviction puts Woodard in a sentencing range of 25 to 35 years, and possibly greater given that the prosecutor has alleged three aggravators, which will be litigated in August. In a *Glass* recording, Woodard admitted to multiple instances of abuse over a period of months. At trial, his attorney unsuccessfully argued that the abuse consisted of touching, but not penetration. The prosecutor for this case was ADA Rachel Gernat.

### **Sentencings**

On July 9, Judge Kari Kristiansen sentenced Richard L. Evans to five years with one year suspended (four years to serve) on a single count of misconduct involving a controlled substance in the fourth degree for possessing methamphetamine. Evans was found guilty at trial in April. He had prior felony convictions for attempted manufacture of methamphetamine and promoting contraband. This case was ADA Suzanne Powell's.

Kenny Blanco was sentenced to four years, with two years suspended on a charge of assault in the third degree. The case involved him threatening his girlfriend with a crowbar after physically assaulting her. Blanco had a prior felony drug conviction from Washington and has been in custody since he was arrested. ADA Rachel Gernat handled this case for the state.

Martin Fleming was sentenced to four years, with two years suspended for attempted sexual abuse of a minor in the second degree. Fleming touched two girls over their clothes while employed as a school monitor. The girls reported his misconduct to their guidance counselor. Fleming was under the influence of a

number of drugs during the time of the offenses. His sentence requires him to register as a sex offender for 15 years. ADA Rachel Gernat tried this case.

### **Pleas**

On July 18 with a jury waiting in the hallway, Leo O. Stenseth pled no contest to all the pending felony charges against him: two class A felonies (misconduct involving a controlled substance in the second degree); two class B felonies (misconduct involving a weapon in the second degree and scheme to defraud); and four class C felonies (two counts of misconduct involving a controlled substance in the fourth degree, theft in the second degree and forgery). Stenseth had been forging prescriptions and selling oxycontin. Evidence collected at his home included a video of him "shooting up" an unknown woman. Sentencing is scheduled for November 20. ADA Suzanne Powell is the prosecutor.

Lyle Kackman, former owner of H&C Feed in Palmer, pled no contest to two consolidated counts of sexual abuse of a minor in the second degree, involving five victims. In his statement to police, Kackman, 73, and in poor health, acknowledged engaging in similar conduct for the past 35 years. His sentence agreement is 15 years, with 8 years suspended, (7 years to serve), with 10 years of probation and a requirement of sex offender registration. The prosecutor is ADA Rachel Gernat.

### **Indictments**

Edward Wooley Jr. was indicted on charges of robbery in the first degree, assault in the second degree, assault in the third degree and theft in the second degree. The victim, a 21-year-old Japanese national, was touring Alaska alone. He left his backpack unattended while walking down to a river, and it was stolen. After reporting the theft he purchased new camping equipment and resumed his venture. Wooley approached the victim-tourist and told him he could get his

property back from the thief for \$400. The victim only had \$200 on his person and gave it to the defendant. Wooley took the victim to his property and then invited the victim to camp with him. The following morning, Wooley took the victim to a remote location under the guise of showing him a glacier. As the victim was about to take a photograph, Wooley hit him in the head a number of times with a log. The victim's finger accidentally switched the camera setting from photo to video clip, and the camera captured the victim's terror-stricken cries and the defendant's ATV. After leaving the victim in the woods, Wooley returned to camp and stole all the victim's property. ADA Richard Payne is the prosecutor for the state.

Tomy Buskirk was indicted on a charge of burglary in the first degree. Buskirk essentially moved into the home of a victim who left the state because of a family emergency. The defendant, who was a stranger to the victim, made himself comfortable by drinking the victim's beverages, smoking cigarettes (in a non-smoking home), renting and watching pornographic videos and going through the victim's belongings. Upon returning home, the victim regained control over his castle by giving Buskirk a blow to the chest, which incapacitated Buskirk and gave the police an opportunity to arrive and make an arrest. ADA Richard Payne is also the prosecutor for this case.

## SAVE THE DATE

September 27-28 -	Civil Division Supervisor's Retreat, Girdwood
October 29-31 -	DA Conference, Girdwood
November 27-30 -	NAAG Winter Meeting Park City, Utah